IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs November 18, 2008

STATE OF TENNESSEE v. AUGUSTA THOMAS ROBINSON

Direct Appeal from the Criminal Court for Knox County
No. 83088 Kenneth F. Irvine, Jr., Judge

No. E2008-01008-CCA-R3-CD - Filed March 25, 2009

The Defendant, Augusta Thomas Robinson, pled guilty to attempted aggravated burglary and disorderly conduct. The parties agreed upon an effective sentence of three years, with the trial court to determine the manner of service of the sentence. The trial court ordered the Defendant to serve the sentence in confinement. The Defendant now appeals, contending that the trial court erred when it denied him an alternative sentence. After thoroughly reviewing the record and applicable authorities, we affirm the trial court's judgments.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which THOMAS T. WOODALL, and JAMES CURWOOD WITT, JR., JJ., joined.

J. Liddell Kirk, Knoxville, Tennessee, for the Appellant, Augusta Thomas Robinson.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Matthew Bryant Haskell, Assistant Attorney General; Randall E. Nichols, District Attorney General; Zane M. Scarlett, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION
I. Facts

A Knox County jury indicted the Defendant on charges of attempted aggravated burglary, a Class D felony, and disorderly conduct, a Class C misdemeanor. He pled guilty to both offenses, and, at his guilty plea submission hearing, the State informed the trial court that, had the case gone to trial, the evidence would have proven the following:

> [O]n February 21, 2005, about 6:50 in the evening, 911 received a phone call of terrified Elizabeth Cotton, who said that there was a man trying to break into her apartment. He was banging on the front door and saying that "open the door or I'm coming in."
>
> She knew that about four days prior to this that this same man had, in fact, entered an apartment below her and had assaulted the woman involved – or in that apartment.
>
> So the police – the Knoxville Police Department arrived and found that the front screen door of Ms. Cotton's apartment – this is Ridgebrook Apartments, by the way, KCDC housing – and the heavy-duty screen storm door on the front had been damaged.
>
> By the time the police arrived, the individual had moved away from the apartment, but he did approach the officers screaming and making a scene, and he was placed under arrest at that time.

After questioning the Defendant, the trial court accepted the Defendant's plea of guilty to attempted aggravated burglary, a Class D felony, and disorderly conduct, a Class C misdemeanor. The trial court sentenced the Defendant to a three-year sentence for the felony conviction and thirty days for the misdemeanor conviction.

The Defendant applied for probation. At the hearing on this application, the presentence report was admitted into evidence. The Defendant's counsel informed the trial court that the report showed that the Defendant had some previous misdemeanor assault convictions from 1989 and 1999. He also had one other burglary-related offense that was not a violent offense. The Defendant's counsel noted that the report concluded that the Defendant's mental health stability had deteriorated and that he was a continued threat to public safety. Counsel noted, however, that the Defendant had been out of custody for the majority of the three years since this incident and that he had not had any more arrests or charges. The Defendant asked the court to sentence him to probation or to serve his sentence in a halfway house.

The State informed the trial court the Defendant did not "show up" for his presentence investigation, and he was taken into custody until that could be completed. Further, the State informed the court that the Defendant was on probation for drug and "license" convictions at the time that the offenses involved in this case were committed. The State noted that the report showed that the Defendant had previously had his probation revoked on several occasions. The State informed the trial court that the Defendant had missed many court dates and that "the only time that he's been here or when we got him here is when we had him in our custody."

Based upon the presentence report and the arguments of the parties the trial court found:

[The Defendant], what I have before me is a series of reports that questions your ability to be successful on any type of release. The people at CAPP don't think you're appropriate, the people at Enhanced; and the report we received from regular state probation is that you are a high risk. It certainly has a lot to do with repeats of problems over a period of years. It looks like – this goes back to 1987 when you were 18 years old. You've been – had problems on a regular basis since then.

It's also a problem that when you've been on supervised probation here in Knox County the last couple of times, each and every time, you've not been successful. You've been revoked from that. That's why the people are not wanting to take you. It also convinces this Court that you're not an appropriate candidate for probation, that you need to serve this sentence in the Tennessee Department of Corrections.

The case we have before us is a fairly serious case. It's not the most serious case this Court sees, but it's serious enough. And the fact that you have not been successful, repeatedly, both with County Probation – and it looks like there's a TOMIS report in here that has your being an absconder there, and on them released and being revoked from that.

Apparently, your mental health problems caused you to get in trouble this time. It makes it so you were unable to – it looks like your last employment is from 1999.

It does not appear that you're going to be a person that can be successful on any one of our programs. So the Court believes the only option is available to you is to serve this sentence. So it's going to be the order of the Court that you serve this sentence – it's a three-year sentence – in the Tennessee Department of Corrections.

It is from this judgment that the Defendant now appeals.

II. Analysis

On appeal, the Defendant contends that the trial court erred when it denied him probation because the trial court did not make a specific finding that confinement was necessary to protect the public or that confinement was necessary to avoid depreciating the seriousness of the offense or to provide an effective deterrent. The Defendant notes that the trial court based its finding solely on the fact that he had violated probation previously and argues that his prior revocations were neither "frequent" nor "recent." The Defendant concedes that the record shows that his probation had been revoked in the past, but he contends these revocations were "not necessarily frequently or recently." The State responds that the trial court "considered the factors and principles of sentencing, followed appropriate statutory procedure, made an affirmative showing

in the record of those considerations, and imposed a lawful sentence." We agree with the State.

When a defendant appeals the manner of service of a sentence imposed by a trial court, this court conducts a *de novo* review of the record with a presumption of correctness as to the trial court's determination. T.C.A. § 40-35-401(d) (2005). However, this presumption of correctness arises only if the record affirmatively shows that the trial judge considered both the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The appealing party carries the burden of showing the sentence is improper. T.C.A. § 40-35-401(d), Sentencing Commission Comments. Even if we prefer a different result, we may not disturb the sentence if the trial court followed the statutory sentencing procedure, made findings of fact adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act. *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The Tennessee Supreme Court noted recently that, due to the 2005 sentencing amendments, a defendant is no longer presumed to be a favorable candidate for alternative sentencing. *State v. Carter*, 254 S.W.3d 335, 347 (Tenn. 2008) (citing T.C.A.§ 40-35-102(6) (2006)). Instead, a defendant not within "the parameters of subdivision (5) [of T.C.A. § 40-35-102], and who is an especially mitigated or standard offender convicted of a Class C, D or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." *Id.* (footnote omitted). Generally, defendants classified as Range II or Range III offenders are not to be considered as favorable candidates for alternative sentencing.[1] T.C.A. § 40-35-102(6); 2007 Tenn. Pub. Acts 512. Additionally, we note that a trial court is "not bound" by the advisory sentencing guidelines; rather, it "shall *consider*" them. T.C.A.§ 40-35-102(6) (emphasis added).

If a defendant seeks probation, then that defendant bears the burden of "establishing [his] suitability." T.C.A. § 40-35-303(b) (2006). As the Sentencing Commission points out, "even though probation must be automatically considered as a sentencing option for eligible defendants, the defendant is not automatically entitled to probation as a matter of law." T.C.A. § 40-35-303 (2006), Sentencing Comm'n Cmts.

A trial court may deny alternative sentencing and sentence a defendant to confinement based on any one of the following considerations:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others

[1] The legislature did carve out an exception to this rule where if "a defendant with at least three (3) felony convictions is otherwise eligible, such a defendant may still be considered a favorable candidate for any alternative sentencing that is within the jurisdiction of and deemed appropriate by a drug court." 2007 Tenn. Pub. Acts 512.

likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

T.C.A. § 40-35-103 (2006). Also, the trial court may consider the mitigating and enhancing factors set forth in T.C.A. § 40-35-113 and 114. T.C.A. § 40-35-210(b)(5); *State v. Boston*, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). A trial court should also consider a defendant's potential or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. T.C.A. § 40-35-103(5); *Boston*, 938 S.W.2d at 438.

In conducting *de novo* review of a sentencing determination, we must consider (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct; (5) any mitigating or statutory enhancement factors; (6) any statistical information provided by the administrative office of the court as to sentencing parties for similar offenses in Tennessee; (7) any statement that the defendant made in his own behalf; and (8) the potential for rehabilitation or treatment. T.C.A. § 40-35-103, -210(b) (2006); *see State v. Ashby*, 823 S.W.2d 166, 168 (Tenn. 1991).

In the case under submission, the trial court imposed a sentence of confinement based on the Defendant's extensive history of failure to comply with the conditions of probation. The trial court noted, among other things, that "[i]t's also a problem that when you've been on supervised probation here in Knox County the last couple of times, each and every time, you've not been successful." We conclude that the trial court did not err in its sentencing determinations. The presentence report contained in the record indicates that the Defendant has previously had his probation revoked on at least three occasions. Based on this record, we conclude that the trial court did not err when it imposed a sentence of incarceration.

III. Conclusion

Based on the foregoing reasoning and authorities, we affirm the judgments of the trial court.

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ROBERT W. WEDEMEYER, JUDGE